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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ASUS COMPUTER INTERNATIONAL; and ASUSTEK COMPUTER INCORPORATED, Plaintiffs, v. INTERDIGITAL, INC.; INTERDIGITAL COMMUNICATIONS, INC.; INTERDIGITAL TECHNOLOGY CORPORATION ; IPR LICENSING, INC. ; and INTERDIGITAL PATENT HOLDINGS, INC., Defendants.	Case No.: 15-cv-1716 (BLF) **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO AMEND SCHEDULING ORDER AND FOR LEAVE TO FILE FIRST AMENDED COUNTERCLAIMS** **JURY TRIAL DEMANDED** Hearing Date: June 7, 2018 Time: 9:00 a.m. Judge: Hon. Beth Labson Freeman

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I. INTRODUCTION

In its Opposition, Asustek insists that InterDigital did not "learn any new facts in discovery in 2018 that it did not already know prior to this litigation." Opp. at 4. This is false. In the weeks before *and after* the close of fact discovery, Asustek provided deposition testimony and produced documents that, for the first time, [redacted] Because Asustek cannot dispute that InterDigital filed its Motion based on Asustek's recent production of evidence of intentional interference, Asustek's attempts to mischaracterize the new evidence as duplicative of previously-known facts and to cast InterDigital's Motion as untimely are unfounded. Nor can Asustek demonstrate futility of amendment (where the statute of limitations is subject to tolling), prejudice (with trial scheduled for May 2019), or bad faith (where Asustek produced relevant documents *after* the close of fact discovery). InterDigital respectfully requests that the Court grant its Motion.

II. ARGUMENT

A. InterDigital Exercised Diligence in Filing this Motion

Claiming that InterDigital has not acted diligently, Asustek relies heavily on a February 2015 letter in which [redacted] *See* Opp. at 4; ASUS Ex. 1. According to Asustek, InterDigital could and should have rushed to court at that time. Not only does Asustek's position fault InterDigital for attempting to diligently resolve the parties' range of disputes, but it conflates an assertion made between parties [redacted] with an obligation to raise a formal legal claim. Asustek also ignores the new information that InterDigital learned through the course of discovery and how such information impacted InterDigital's analysis of whether to file a claim.

Courts routinely recognize that the diligence requirement of Federal Rule of Civil Procedure 16 does not obviate the requirement of Federal Rule of Civil Procedure Rule 11 that parties have a sufficient evidentiary basis to bring a claim. *See LifeScan Scotland, Ltd. v. Shasta Techs., LLC*, Case No. 11-cv-04494, 2013 WL 4777179, at *2 (N.D. Cal. Sept. 6, 2013) (granting leave to amend where "it [was] unclear whether the moving [party] had sufficient

evidence to back up [its] suspicions"); *Macias v. Cleaver*, Case No. 1:13-cv-01819, 2016 WL 8730687, at *4 (E.D. Cal. Apr. 8, 2016) (granting motion to amend where moving party suspected misconduct, but "it was not until [production of] the specific documents in discovery that the alleged breadth and extent of Defendants' possible conduct came to light"); *Allstate Ins. Co. v. Regions Bank*, Civil Action No. 14-0067, 2014 WL 4162264, at *5 n.11 (S.D. Ala. Aug. 19, 2014) ("reasonable diligence" does not require raising speculative claims); *Gooden v. Suntrust Mortg., Inc.*, No. 2:11-cv-2595, 2013 WL 3149266, at *3 (E.D. Cal. June 19, 2013) (requiring party to "advance claims before [having] a factual basis for doing so" would be "inconsistent" with Rules 8 and 11).

Prior to receiving Asustek's recent discovery, InterDigital was aware that [redacted] Asustek's references to prior evidence do not reveal anything more. *See, e.g.*, ASUS Ex. 6 [redacted]; IDC Ex. 21 [redacted] While supportive of InterDigital's counterclaim, such statements do not delineate how or when [redacted] Nor does InterDigital's previous assertion [redacted] amount to an admission that InterDigital had sufficient evidence to bring a *tortious* interference claim in February 2015. *See Am. Gen. Life Ins. Co. v. Schoenthal Family, LLC*, No. 1:06-cv-00695, 2007 WL 1752471, at *2 (N.D. Ga. June 15, 2007) ("[t]hat Defendants [previously] threatened such claims, however, does not mean that they could have filed them").

Moreover, the diligence inquiry under Rule 16(b) generally focuses on "the time between the moving party's discovery of new facts and its asking leave of the court to file an amended pleading." *Lane v. Wells Fargo Bank, N.A.*, No. C 12-04026, 2013 WL 1164859, at *2 (N.D.

Cal. Mar. 20, 2013). Asustek's disingenuous claim that the new facts are "substantively the same" ignores that the new discovery establishes: (1) [redacted] (IDC Ex. 6); (2) [redacted] (IDC Ex. 15); and (3) [redacted] (*id.*). Such evidence elucidates Asustek's wrongful intent, differs markedly from the limited facts to which InterDigital previously had access, and provides InterDigital with a sufficient basis to assert its counterclaim.

Furthermore, Asustek's assertion that InterDigital "sat on its hands" is similarly inaccurate. Because InterDigital and Asustek are parties to a license agreement, InterDigital did not view immediate commencement of litigation as advisable or productive. Rather, InterDigital made efforts to resolve the dispute [redacted]

B. Asustek Cannot Demonstrate Futility of Amendment

Asustek cannot show, as futility requires, that there is "no set of facts [that] can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim." *McFall v. Stacy and Witbeck, Inc.*, Case No. 14-cv-04150, 2016 WL 2851589, at *3 (N.D. Cal. May 16, 2016). Although Asustek insists that InterDigital's claim is time-barred, Asustek also acknowledges the delayed discovery rule (Opp. at 8): "accrual is postponed until the plaintiff either discovers or has reason to discover the existence of a claim." *Gem & I Products, Inc. v. Disney Consumer Products, Inc.*, Case No. SACV 10-1051, 2011 WL 13225119, at *3 (C.D. Cal. Apr. 11, 2011). InterDigital's new allegations support application of this rule here.

In *Gem & I Products*, plaintiff was well aware of defendant's instruction to a third-party vendor not to do business with plaintiff. *See id.* at *2. Years later, after plaintiff discovered that defendant was selling allegedly infringing products, plaintiff learned that the purpose of defendant's instruction was to disrupt plaintiff's own efforts to launch a product. *Id.* Finding that plaintiff's *perception* of defendant's motivation was relevant to delayed discovery, the court

denied defendant's motion to dismiss plaintiff's intentional interference claim, despite plaintiff's filing over two years after the underlying events had taken place. *See id.* at *3.

Here, while InterDigital was aware of [redacted] *See* Dkt. No. 191-4 ¶ 50. As discussed above, the new evidence in fact reveals that [redacted] *See supra* Section II.A.

Asustek's cited case law is substantively and procedurally inapposite. In *Ray Bourhis Associates v. Principal Life Ins. Co.*, Case No. 3:15-cv-04329, 2015 WL 7180621 (N.D. Cal. Nov. 16, 2015), the court *denied a motion for summary judgment* where defendant claimed plaintiff was barred by a two-year statute of limitations because of triable issues of material fact concerning whether plaintiff should have previously known of the allegedly wrongful conduct. *See id.* at *4. Similarly, because there are triable issues of material fact concerning the extent of InterDigital's knowledge regarding [redacted], the Court should reject Asustek's arguments regarding futility. *See Heath v. Google*, Case No. 15-cv-01824-BLF, 2017 WL 4005598, at *3 (N.D. Cal. Sept. 12, 2017) (finding that "in-depth evaluation of the futility of the claim on a motion for leave to amend would be premature").

Asustek's Opposition also ignores other exceptions to the statute of limitations, such as the continuous accrual and relation back doctrines. *See Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1199 (2013) ("continuous accrual applies whenever there is a continuing or recurring obligation"); *Luck v. OTX Acquisition Corp.*, CV 10-1671, 2010 WL 11595817, at *6 (C.D. Cal. Aug. 3, 2010). Asustek has not shown that InterDigital's counterclaim is time-barred under these various doctrines.

C. Asustek Cannot Show Substantial Prejudice from Amendment

Asustek claims that denying its right to conduct discovery would be prejudicial. Opp. at 9. However, Asustek ignores the ample evidence already in its possession and, most

significantly, fails to identify any additional discovery it would seek beyond "the opportunity to explore the factual premises of [InterDigital's] counterclaim and possible affirmative defenses." *Id.* Indeed, Asustek's Opposition cites a range of materials which Asustek already possesses or has obtained in discovery, including [redacted] *See generally* ASUS Exs. 1-17. Asustek does not need and does not specifically identify more than this.

Alternatively, Asustek insists that reopening fact discovery would be prejudicial and delay trial. Asustek's cited case law on this point is inapposite. *See Hamilton v. Marx*, LACV 10-07278, 2012 WL 12882947, at *6 (C.D. Cal. July 24, 2012) (finding prejudice where non-moving party had already moved for summary judgment and trial was only three months away); *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (trial six months away); *GSI Tech., Inc. v. United Memories, Inc.*, Case No. 5:13-cv-01081, 2015 WL 4463742, at *3 (N.D. Cal. July 21, 2015) (trial five months away). Here, even if some limited additional discovery were appropriate, Asustek has nearly *12 months* to take such discovery, move to dismiss and/or for summary judgment, and prepare for trial. *See Heath*, 2017 WL 4005598, at *2 (prejudice is "slight" under similar circumstances). Moreover, where (as here) new allegations "all relate to evidence and discovery that is in plaintiff's possession and control," "shortened preparation time" is not unfairly prejudicial. *Trimble Navigation Ltd. v. RHS, Inc.*, No. C 03-1604, 2007 WL 2727164, at *11 (N.D. Cal. Sept. 17, 2007).

D. There Is No Evidence of Bad Faith

Asustek argues that InterDigital acted in bad faith by making "a tactical decision" to wait until after the close of fact discovery to file this Motion. Opp. at 10. This accusation is baseless and inappropriate, as Asustek produced documents underlying InterDigital's Motion *after the close of fact discovery*, thus denying InterDigital the opportunity to depose Asustek's witnesses about those documents. *See* Mot. at 4-5. Nor can Asustek feign ignorance of InterDigital's objectives when InterDigital's counsel spent a significant amount of deposition time questioning Asustek's witnesses about Quanta in late February 2018. Asustek had every opportunity to follow up during depositions of InterDigital's witnesses, all of which took place in March 2018.

Dated: May 18, 2018

Respectfully submitted,

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